STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 28, 2011
v	No. 295825 Calhoun Circuit Court
RONALD LEE JEX, Defendant-Appellant.	LC No. 2004-003072-FH

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Defendant, acting *in propria persona*, appeals by leave granted the trial court's December 17, 2009 order denying defendant's motion for relief from judgment from his November 4, 2004 conviction for third-degree home invasion, MCL 750.110a(4), which was entered after a no contest plea. Defendant was sentenced, as habitual offender-second offense, to 18 to 90 months' imprisonment for this offense. Because defendant has presented evidence that, if accurate, provides sufficient grounds for relief from judgment, we affirm in part, reverse in part, and remand for further proceedings as outlined below.

I. FACTS

Defendant's conviction involved a combined plea proceeding concerning the initially charged offense of second-degree home invasion, MCL 750.110a(3), and charging as a habitual offender-second offense in the instant case, as well as a second charge of felonious assault as a habitual offender-third offense in an unrelated incident. Pursuant to the agreement, defendant would plead no contest to felonious assault in return for a reduction to second-habitual status, and would plead no contest to third-degree home invasion in the instant case in return for a reduction in the charge and in his habitual offender status. The agreement also contained a sentencing agreement; i.e., that defendant would receive concurrent sentences of "probation with time capped at county time."

At the plea hearing, the trial court provided cautionary instructions concerning the felonious assault plea first, including the possible maximum penalty for the offense, and the rights that defendant would waive by his plea. Defense counsel then read a factual basis for that charge into the record. As to the home invasion plea, the trial court provided the possible maximum penalty, asked defendant whether he understood the rights he would be giving up, and

defendant replied affirmatively. The trial court then asked for a factual basis for the plea and defense counsel stated:

> I can provide that, your Honor. And I'll summarize as follows: this occurred on or about August 4th of the year 2004 in Bedford Township, Calhoun County, state of Michigan. At that time my client entered without permission a residence in which his former girlfriend Cheryl Williams resided and she awoke in the early morning hours, saw my client standing over her. She told him to get out of the house. He left. Apparently he entered through the front door. And she woke up early in the morning and found certain items of personal property missing. She believes that he took them.

The trial court asked whether the attorneys were satisfied that there was a factual basis to accept the plea, and both replied affirmatively. The trial court then asked whether any other undisclosed promises, threats, or inducements had been made and defense counsel replied that she was not aware of any. The trial court then accepted the second plea.

During sentencing on November 4, 2004, the trial court discussed the presentence investigation report (PSIR) and asked if defendant had any factual errors that needed to be corrected. Defendant maintained that he completed probation for a fleeing and eluding conviction that occurred in Barry County and that this was not in the report. Counsel challenged the ten points scored for offense variable (OV) 10. The trial court found the scoring appropriate. The court then asked whether there was a sentencing agreement, and defense counsel reiterated the agreement and asked the court to follow it. However, the prosecutor objected on the ground that he did not contemplate the information in the PSIR, including defendant's earlier failures at probation and the probation department's recommendation, when he agreed to the deal, and asked to "withdraw" from the agreement. Defense counsel objected on the ground that the prosecution had all the pertinent information. However, the trial court then stated that it was not bound by the agreement and, after reviewing the PSIR, decided it would not go along with the plea agreement. The trial court specifically noted that there had been three prior circuit court probations that had resulted in revocations and did not find that probation was appropriate. The trial court then asked defendant whether he wished to withdraw his plea. After consulting with defense counsel, defendant stated that he wanted to proceed with sentencing. The trial court subsequently noted defendant's criminal history and sentenced defendant to 18 to 90 months for the instant offense.

Defendant sought no direct appeal. In October 2009, defendant moved for relief from judgment. The trial court denied the motion, finding that defendant could have raised his claims of error and ineffective assistance in a direct appeal, had failed to demonstrate good cause for failing to do so, and had failed to show actual prejudice. The trial court also found that the factual basis for the plea was sufficient, and that "[b]y pleading No Contest, the Defendant chose not to contest his factual guilt and waived any claims regarding the factual sufficiency of the plea." The trial court further found no jurisdictional defect, and that the plea was entered freely, voluntarily and knowingly.

II. DENIAL OF MOTION FOR RELIEF FROM JUDGMENT

Listing various reasons to support his claim, including a lack of jurisdiction, ineffective assistance of counsel, and lack of an adequate factual basis to support his plea, defendant first argues that this Court should grant him relief from his plea-based conviction on the ground that he could not have been convicted of third-degree home invasion, primarily because he had the right to possess the premises.

This Court reviews for an abuse of discretion the trial court's denial of defendant's motion for relief from judgment, and it reviews for clear error the trial court's underlying factual findings. *People v Clark*, 274 Mich App 248, 251; 732 NW2d 605 (2007). To the extent this Court views this issue as a motion to withdraw his no contest plea, a trial court's denial of a defendant's motion to withdraw a guilty plea is also generally reviewed for an abuse of discretion. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997). An abuse of discretion occurs when the trial court's decision falls outside a range of principled outcomes. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*.

Because defendant has raised a colorable claim that his plea proceeding was improper due to a serious question of whether defendant could have been charged with or convicted of third-degree home invasion under the facts presented and whether he had effective assistance of counsel during the proceeding, we vacate the trial court's denial of defendant's motion for relief from judgment and remand for further evidentiary proceedings.

Under MCR 6.508, the trial court may not grant post-appeal relief regarding a claim that "alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion" unless the defendant can show both good cause for failing to raise the grounds for relief earlier and that the alleged irregularity resulted in actual prejudice. MCR 6.508(D)(3); see also *People v McSwain*, 259 Mich App 654, 680-681; 676 NW2d 236 (2003). Good cause may be established by showing ineffective assistance of counsel, *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004), citing *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995), or "by showing that some external factor prevented counsel from previously raising the issue . . . ." *Reed*, 449 Mich at 378-379. However, a court may also waive the good cause requirement "if it concludes that there is a significant possibility that the defendant is innocent of the crime." MCR 6.508(D)(3).

Because defendant pled no contest in this case, for actual prejudice defendant must show "the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand." MCR 6.508(D)(3)(b)(ii). Alternatively, defendant can also show actual prejudice if "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D)(3)(b)(iii).

Defendant argues that he need not show good cause and actual prejudice because his claim involves a "jurisdictional" defect. He also argues alternately that he has shown good cause, or that the trial court should have waived the good cause requirement because he is innocent of third-degree home invasion.

Defendant's basic allegation, i.e., that he could not be convicted of the crime of third-degree home invasion due to his lessee status with respect to the home involved, arguably presents a claim of a jurisdictional defect for which he need not demonstrate cause or prejudice to raise. In *People v Carpentier*, 446 Mich 19; 521 NW2d 195 (1994), our Supreme Court noted that a defendant "may always challenge whether the state had a right to bring the prosecution in the first place." *Id*. at 27, quoting *People v Alvin Johnson*, 396 Mich 424, 442; 240 NW2d 729 (1976). "Such rights and defenses 'reach beyond the factual determination of defendant's guilt and implicate the very authority of the state to bring a defendant to trial . . .'" *People v New*, 427 Mich 482, 491; 398 NW2d 358 (1986), quoting *People v White*, 411 Mich 366, 398; 308 NW2d 128 (1981) (Moody, J., concurring in part and dissenting in part). A jurisdictional defect or its equivalent has been found where the defendant asserts improper personal jurisdiction, improper subject matter jurisdiction, double jeopardy, or imprisonment where the trial court had no authority to sentence the defendant to the institution in question, or when the defendant was convicted for no crime at all. *Carpentier*, 446 Mich at 47-48 (Riley, J., concurring). Our Supreme Court has also held that an example of a defect "similar" to a jurisdictional defect, in that it involves the right of the government to prosecute the defendant in the first place, is when the defendant is charged under an unconstitutional or inapplicable statute. *New*, 427 Mich at 492; see also *People v Beckner*, 92 Mich App 166, 169; 285 NW2d 52 (1979). Here, then, we find that defendant's claim of error can be fairly found to be jurisdictional where defendant's arguments could alternately be read as an assertion that he was charged under an inapplicable statute, or that the conduct as charged did not constitute an offense. See *Alvin Johnson*, 396 Mich at 440. See also *People v Szpara*, 196 Mich App 270, 272; 492 NW2d 804 (1992) (holding that the defendant's argument that he could not properly be charged with breaking and entering his own home is a claim "challenging the prosecution's authority to proceed against him in the first place" and was not waived by his no contest plea).

Regardless of whether this claim is a jurisdictional one within the meaning of MCR 6.508(D)(3), we hold that, contrary to the trial court's opinion and the prosecution's argument on appeal, defendant's claims were not waived by his no contest plea. To the extent defendant challenges the statute's applicability to him, it was not waived by the plea. *New*, 427 Mich at 492; *Szpara*, 196 Mich App at 272; *Beckner*, 92 Mich App 169. Moreover, contrary to the prosecution's assertion on appeal, defendant's alternate claim that the plea was not supported by an adequate factual basis is not waived by a guilty plea or a plea of no contest. *People v Mitchell*, 431 Mich 744, 749-750; 432 NW2d 715 (1988), superseded by statute on other grounds.

Defendant poses various reasons why the trial court should have granted his motion for relief from judgment and seeks alternate forms of relief, including a reversal of his conviction, the ability to withdraw his plea, and a *Ginther* hearing to resolve his claims of ineffective assistance. In deciding this issue, we note that, once a guilty plea or a plea of nolo contendere has been accepted by the trial court, the defendant has no absolute right to withdraw it. *People v Eloby* (*After Remand*), 215 Mich App 472, 474-475; 547 NW2d 48 (1996); *People v Gomer*, 206

Mich App 55, 56; 520 NW2d 360 (1994). When a defendant moves to withdraw his no contest plea after sentencing, the burden is on the defendant to establish "that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside." MCR 6.310(C). To the extent a defendant's claim rests on an assertion that his plea was due to ineffective assistance of counsel, the proper focus is on whether the plea was made knowingly and voluntarily. *In re Oakland Co Prosecutor*, 191 Mich App 113, 120; 477 NW2d 455 (1991). "[W]hether a plea is unintelligently made depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases, not on whether counsel's advice was right or wrong." *People v Haynes*, 221 Mich App 551, 558-559; 562 NW2d 241 (1997), citing *In re Oakland Co Prosecutor*, 191 Mich App at 122. As to whether the trial court established a sufficient factual basis for the plea, MCR 6.302(D)(2)(b) requires a trial court to hold a hearing, and find a factual basis for a plea before accepting it:

> (2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:
>
> (a) state why a plea of nolo contendere is appropriate; and
>
> (b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of the offense charged or the offense to which defendant is pleading to be accepted.

Viewing the substance of defendant's claim, MCL 750.110a provides in pertinent part:

> (3) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.
>
> (4) A person is guilty of home invasion in the third degree if the person does either of the following:
>
> (a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

Thus, as noted by our Supreme Court in *People v Wilder*, 485 Mich 35 43; 780 NW2d 265 (2010), to satisfy the first element of either second or third-degree home invasion, the defendant must either break and enter a dwelling or enter it without permission. "'Without permission' means without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling." MCL 750.110a(1)(c).

In his motion for relief from judgment, and now on appeal, defendant admits that he did not have permission to enter the home and take any of the complainant's belongings. He argues instead that he did not need permission to enter because he and the complainant had leased the residence for themselves and their two children. Given the definition MCL 750.110a(1)(c), and previous case law, defendant correctly asserts that, if he had a legal right to enter the premises, then he did not need permission to enter the premises, and the entering without permission element of the conviction offense is not present. See e.g., *People v Rider*, 411 Mich 496, 497-501; 307 NW2d 690 (1981) (a defendant does not commit a breaking if access is obtained by use of a key entrusted to him without restrictions on its use); *People v Brownfield* (*After Remand*), 216 Mich App 429, 432; 548 NW2d 248 (1996) (a defendant does not commit a breaking and entering if he has the right to enter the building, even if the defendant commits a larceny once in the building). Thus, the essential issue is whether the evidence showed that defendant was a lessee, with his own right to enter the home, and that no other legal barrier prevented him from exercising that right.

In support of his claim, defendant provided the trial court with a signed copy of a lease for the premises that he purportedly executed on January 3, 2004, accompanied by an affidavit of Sandra Holbrook, the owner of the leased residence and defendant's mother. Holbrook avers, in part, that she leased the residence to defendant, that defendant resided in the residence with Williams and defendant's two sons, that she canceled the lease in September, 2004, after defendant was jailed and Williams could no longer afford the rent, that defendant had keys to the residence, and that she had not evicted defendant. Defendant also attached his bond form, and two orders appointing defendant's trial attorney to represent him in both the instant case and in the assault case. These documents list the residence as defendant's residence. Finally, defendant appends a copy of a letter supposedly written by Williams to defendant, which is dated December 19, 2004. In the letter, Williams wrote:

> I knew you were coming to get your stuff and that was fine. . . . The house was more mine than yours. I was the one paying the rent and all the other bills, you just stayed there when you wanted to. Most of the stuff in the house was mine not yours. I got your keys from my mom and gave them to your mom because I moved out in September. . . .

Defendant also provides his own affidavit with similar assertions concerning his residence at the home. Nothing in the facts presented suggests that defendant was prevented from entering the premises by PPO or other court order. Plaintiff does not even discuss the merits of defendant's underlying assertion on appeal.

Reviewing this evidence, we find that defendant has established a colorable basis for relief from judgment. The factual basis for the plea as given by defense counsel did not touch upon whether defendant was entitled to enter the home irrespective of whether he had permission

from Williams to do so.[1] Because defendant has presented sufficient evidence to support his assertion that he could not be charged with home invasion, we find merit in his arguments challenging the prosecution's authority to proceed against him in the first place. *Szpara*, 196 Mich App at 272. Defendant further presents a plausible claim of ineffective assistance of counsel in the taking of his plea. As noted, the bond and attorney appointment documents listed the residence as defendant's address and, presumably, his attorney was aware of this fact. Defendant contends that counsel did not adequately explain the elements of the crime or any applicable defenses to him and, thus, he did not realize that he could not have been found guilty of the charge. If this is true, given the documents that support a finding that defendant did not need permission to enter the home due to his status as a lessee, defendant's counsel did not provide objectively reasonable advice to plaintiff, such that his plea was not made "intelligently." *Haynes*, 221 Mich App at 558-559. While defendant certainly should have known about the lease and that he lived at the residence, he has raised a credible assertion that he did not recognize the significance of these facts in relation to the charged crime.

Accordingly, we vacate the trial court's denial of defendant's motion for relief from judgment and remand for further proceedings. On remand, the trial court shall review defendant's proffered evidence concerning his claim that he did not need permission to enter the home and prosecutor shall be given an opportunity to put forth evidence to the contrary. If the prosecutor is unable to establish this element of the offense, the trial court shall set aside the conviction. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the no contest plea, and the trial court is directed to hold a *Ginther*[2] hearing to review defendant's ineffective assistance claim to determine whether defendant received objectively reasonable advice from counsel concerning this element of the offense and his defenses and, thus, whether defendant's plea was made intelligently. See *Mitchell*, 431 Mich at 750; *Haynes*, 221 Mich App at 558-559.

III. CHALLENGES CONCERNING SENTENCING

In the event that the trial court concludes that defendant is not entitled to relief from judgment for the reasons above, we decide defendant's concurrent claims.

Defendant argues that he is entitled to relief because the trial court erred in scoring offense variable (OV) 10 at ten points. He further argues that he is entitled to relief because the trial court relied on erroneous information in the presentence information report (PSIR) both to reject the initial sentencing agreement and when determining defendant's sentence.

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[1] We disagree, however, with defendant's argument that counsel's recitation was also deficient concerning a lack of intent to steal. It can be inferred from the recitation that defendant intended to take the complainant's property when he entered the residence.

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

As to the claim that the trial court relied on erroneous information, defendant argues that the PSIR incorrectly stated that defendant had had "three prior Circuit Court probation grants, all of which were revoked because the defendant failed to comply." Defendant maintains that he completed a term of probation for attempted fleeing and eluding and that this information was not reflected in the PSIR. He contends that the inaccurate record was erroneously used to reject the plea agreement and impose the final sentence. However, while defendant may have competed probation on the charge of attempted fleeing and eluding, the PSIR notes three other unsuccessfully completed terms of probation for his adult offenses, and one as a juvenile. Thus, the statement in the PSIR that defendant has had three prior probation grants which were revoked is arguably accurate. We also find without merit defendant's claims that the "inaccurate" information concerning the fleeing and eluding conviction was the only reason the prosecutor and the trial court did not want to adhere to the initial sentencing agreement. It is far more likely that they looked at defendant's additional 28 prior offenses to judge that defendant should not have been given another term of probation. Defendant has not shown he is entitled to relief based on this claim of error.

With respect to defendant's claims that the trial court misscored OV 10, we note that defendant has completed his minimum term of incarceration on the instant offense and has completed his maximum term of incarceration for his concurrent assault conviction. Various panels of this Court have held that under these circumstances this renders the issue moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994); see also *People v Tombs*, 260 Mich App 201, 220; 679 NW2d 77 (2003). Moreover, to the extent we would generally recognize that a defendant should be able to nevertheless raise scoring errors due to collateral consequences such as parole eligibility, see *People v Melton*, 271 Mich App 590, 593 (opinion by Davis, P.J.); 722 NW2d 698 (2006), superseded by statute on other grounds; *Lenart v Ragsdale*, 148 Mich App 571, 575; 385 NW2d 282 (1986); 1996 MR 1, R 791.7715(2)(a)(i), in the instant case we find that the collateral effects of any error are negligible given defendant's lengthy criminal history and prior failed attempts at rehabilitation.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro